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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11 JOHN ALLEN )  
12 Plaintiff, )  
13 v. )  
14 HOMEQ SERVICING INC., )  
15 DOES 1 TO 50, )  
16 Defendant. )  
17 )  
18 )  
ACTION NO: C-08-03798 MMC  
PLAINTIFF'S MEMORANDUM OF  
POINTS & AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS PORTIONS  
OF THE SECOND AMENDED  
COMPLAINT  
Date: October 10, 2008  
Time: 9:00 a.m.  
Location: Courtroom 7, 19<sup>th</sup> Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

## I. INTRODUCTION

20 Plaintiff John Allen (“Allen”) requests that the Court issue an Order denying  
21 Defendant Homeq Servicing Inc’s (“Defendant”) motion to dismiss the first cause of  
22 action for negligent interference of prospective advantage contained in Allen’s second  
23 amended complaint. Allen has alleged sufficient facts to show that an economic  
24 relationship existed between Allen and a third party that contained a reasonably  
25 probable future economic advantage. However, if the Court finds that Allen has not  
26 alleged sufficient facts to state his cause of action for negligent interference with  
27 prospective economic advantage, Allen requests that the Court grant him leave to  
28 amend the complaint.

## II. DISCUSSION

**A. ALLEN REQUESTS THAT THE COURT DENY DEFENDANT'S MOTION TO DISMISS WITH RESPECT TO THE FIRST CAUSE OF ACTION FOR NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.**

Defendant argues that Allen cannot assert a cause of action for negligent interference with prospective economic advantage because (1) Allen has not alleged an existing contractual or economic relationship with a third party, and (2) Defendant had no knowledge of any contractual or economic relationship between Allen and a third party. Defendant's contentions are without merit.

The courts interpret the term “Economic relationship” broadly. In order to state a cause of action for interference with a prospective advantage, a party only needs to show “A colorable economic relationship between the plaintiff and a third party *with the potential to develop into a full contractual relationship.*” Aydin Corp. v. Loral Corp. (9<sup>th</sup> Cir 1983) 718 F2d 897, 904 (Emphasis added); Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 823, 122 Cal. Rptr. 745. Defendant’s argument that Allen’s second amended complaint does not allege an actual business or economic relationship with a third party is specious. In Lowell v. Mother’s Cake & Cookie Co., (1978) 79 Cal. App. 3d 13, 144 Cal. Rptr. 664, the plaintiff was the sole proprietor of a business that he wanted to sell. He received several offers from potential buyers. One buyer made a \$200,000 offer to purchase the business. The offer was contingent on the company continuing its business dealings with defendant. Defendant interfered with the completion of the agreement between the plaintiff and the prospective buyer by telling the buyer that it would discontinue its business dealings if the company was sold to a third party. The prospective buyer decided not to purchase the business, and the company was eventually sold to defendant for a mere \$17,400. The court found that these facts that were alleged in the complaint established that defendant interfered with plaintiff’s prospective advantageous business relationship. The court in Lowell found that an offer to purchase

1 a business was sufficient to constitute an actionable claim for interference with  
2 prospective economic advantage even though the offer to purchase the business was not  
3 accepted.

4 Here, Allen alleges that he made an offer to purchase the home located in  
5 Sacramento, California (Second Amended Complaint at ¶6). The purchase of the home  
6 was contingent upon Allen obtaining the necessary financing to purchase the  
7 Sacramento home. Allen further alleges that “On or about March 7, 2007, [He] was  
8 denied financing, and as a result of this denial, was unable to purchase the home  
9 located at 180 Johnston Road.” (Second Amended Complaint at ¶7) An economic  
10 relationship existed between Allen, the owner of the home in Sacramento, and Step One  
11 Real Estate when Allen made an offer to purchase the Sacramento home. Allen’s  
12 offer to purchase the Sacramento home had the potential to develop into a full  
13 contractual relationship. This transaction did not develop into a contractual relationship  
14 because defendant interfered with Allen’s prospective economic advantage in two  
15 respects. Defendant interfered with Allen’s attempts to purchase the home in  
16 Sacramento by reporting Allen’s loan with defendant as delinquent when the loan was  
17 paid in full. The interference continued when defendant failed to have this false and  
18 derogatory information removed from Allen’s credit report (Second Amended  
19 Complaint at ¶¶9, 10). There is no requirement that the offer has to be accepted in order  
20 to state a claim for negligent interference with prospective economic advantage. In fact,  
21 Allen’s offer was never accepted because of defendant’s interference with the purchase  
22 of the Sacramento home. Therefore, a colorable, economic relationship existed between  
23 Allen and the other parties to the transaction.

24 Allen rejects defendant’s contention that he cannot show that defendant knew  
25 that Allen made an offer to purchase the Sacramento home. Allen can allege that  
26 defendant knew of the existence of the economic relationship between he and the other  
27 parties. The omission of this allegation in the second amended complaint was the result  
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1 of an oversight on the part of the attorneys for Allen (Ridgell declaration at ¶2). In two  
 2 of Allen's numerous attempts to contact defendant in efforts to have the credit report  
 3 error resolved, Allen informed defendant that he needed the false, derogatory  
 4 information removed from his credit report because he was trying to purchase the  
 5 Sacramento home, and this negative credit entry prevented Allen from obtaining the  
 6 necessary financing to purchase the Sacramento home. Also, on or about September 4,  
 7 2007, Allen had participated in a conference call with defendant and Step One Real  
 8 Estate. At that time, both Allen and Step One told defendant that Allen had attempted to  
 9 purchase the Sacramento home but was unable to because defendant reported Allen's  
 10 loan as delinquent when it was paid in full. As a real estate loan company, defendant  
 11 knew or should have known that its failure to correct its mistake would cause Allen to  
 12 lose the future economic benefit that he would have gained if not for defendant's  
 13 incompetence in billing Allen's loan account.

14 Therefore, because Allen can allege that defendant knew of the economic  
 15 relationship between he and the other parties, Allen requests leave to amend the  
 16 complaint to include those allegations.

17           **B. IF THE COURT FINDS THAT ALLEN HAS NOT STATED  
 18 SUFFICIENT FACTS TO SUPPORT HIS CAUSE OF  
 19 ACTION, ALLEN REQUESTS THAT THE COURT GRANT  
 HIM LEAVE TO AMEND**

20           The Fed. R. Civ. Proc. 15(a) provides that a party may amend a pleading "Only  
 21 by leave of court or by written consent of the adverse party; and leave shall be freely  
 22 given when justice so requires." Leave to amend should only be denied if the court  
 23 determines that "Allegations of other facts consistent with the challenged pleading could  
 24 not possibly cure the defect." Schreiben Distributing Co. v. Serv-Well Furniture Co.  
 25 (9<sup>th</sup> Cir. 1986)

26           Here, Allen requests that the Court grant him leave to amend his complaint  
 27 pursuant to Rule 15(a) of the Federal Rules of Civil Procedure in order for him to state  
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sufficient facts to support his cause of action for negligent interference with prospective economic advantage. The allegations concerning defendant's knowledge of the existence of the economic relationship between Allen, the owner of the Sacramento home, and Step One Real estate were omitted in the second amended complaint due to an oversight on the part of Allen's attorneys. Because the defects in the second amended complaint are capable of being cured through further amendment, Allen requests that the Court grant him leave to amend the complaint.

### III. CONCLUSION

9 For the reasons set forth above, Defendant's Motion to Dismiss Allen's second  
10 amended complaint should be denied. Alternatively, Allen requests leave to amend if  
11 the Court finds that he has not stated sufficient facts to support his causes of action.

Dated: August 27, 2008

RIDGELL & LAWLOR LLP

By: \_\_\_\_\_ /s/  
Shawn Ridgell  
Attorney for Plaintiff  
JOHN ALLEN

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